

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG DIVISION, PRETORIA)

5/9/2014

(1) REPORTABLE: YES/NO: NO

CASE NUMBER: 2825/2013

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

In the matter between: -

BAREND OOSTHUIZEN
and

5/9/2014 [Signature]
SIGNATURE APPLICANT

ABSA BANK LIMITED

RESPONDENT

IN RE :

ABSA BANK LIMITED

PLAINTIFF

and

BAREND OOSTHUIZEN

DEFENDANT

JUDGMENT

APPLICATION FOR LEAVE TO APPEAL

VILAKAZI AJ

In a judgment delivered on 4 June 2014, I granted summary judgment in favour of the Plaintiff against the Defendant. The Defendant has applied for leave to appeal against the whole of that judgment.

The test in respect of applications for leave to appeal is well established. I am to consider, in determining this application, whether there is a reasonable prospect that another court might, on appeal come to a determination different to that reached by this court.

The position with regard to the assessment and determination of summary judgment application is well established. The test is whether the Defendant has set out in its opposing affidavit what is referred to as a bona fide defence. A bona fide defence entails more than the allegation of matter, which on its face would amount to a defence. It requires in order for the bona fides requirement to be satisfied, the setting out of sufficient factual allegations to persuade the court that the defence raised, is raised not only in name, but in substance.

[Signature]

The Applicant's application for leave to appeal was premised upon a number of grounds, namely:

1. It was averred that the court erred in finding that the Respondent complied with the National Credit Act 34 of 2005 (the " Act") at the time of institution of the action
2. It was averred that the court erred in not finding that the Respondent instituted its action prematurely
3. It was averred that the court erred in finding that the Applicant was afforded a just opportunity in referring the credit agreement to a debt counsellor in terms of the Respondent's section 129 notice
4. It was averred that the court erred in not finding that the Applicant was not afforded the opportunity to enforce his rights in terms of the Respondents' section 129 notice
5. It was averred the court erred in declaring the Applicant's immovable property , being the primary residence specially executable
6. It was averred that the court erred to find that the Respondent's application for summary judgment complied with the rules of court.

BACKGROUND TO THE APPEAL

2. On 22 January 2013, the Respondent instituted proceedings against the Applicant pursuant to a loan agreement entered into with the Applicant on or about 12 August 2005 and 5 December 2006. On 8 July 2013, the Applicant served and filed its Notice of intention to defend the action.

2.1. On 26 August 2013, the Respondent made an application for summary judgment. The Applicant did not file opposing papers resisting the Respondent's application. The application for summary judgment was set down for hearing on 2 September 2013. By the order of this court (Hughes J) which incorporated the terms of the consent.

2.2. In terms of that order, the application for summary judgment was postponed sine die, it was recorded that the arrears due, owing and payable to Respondent by Applicant as at 02 September 2013, amounted to R211 564 .05 (Two hundred and eleven Thousand five hundred and sixty four rand and five cents). The Applicant undertook to make payments to the Respondent as follows:

2.2.1. Monthly instalments payments in the sum of R56 088. 67 (Fifty six Thousand and eighty eight Rand and sixty seven cents) each, the first payment to be effected on 01 October 2013, and thereafter on 1st day of each subsequent month until such time as the arrears as set out, supra is defrayed, whereafter Applicant will continue with his monthly instalment payments (in terms of the loan agreement) which monthly instalment presently amounts to R 20, 827.13 (Twenty Thousand eight Hundred and twenty seven rand and thirteen cents).

2.2.2. In the event of the Applicant failing to effect timeous payments of any of the amounts supra, the total outstanding capital amount, together with interest thereon, shall immediately become due and payable and the Respondent shall be entitled to proceed with the application for summary judgment. Costs of the application for summary judgment shall be costs in the cause.

DMW

3. This matter came back to court on 4 June 2014 before me. At the hearing, the Applicant requested a postponement, which application was sought from the bar by Applicant's counsel. Counsel for the Applicant raised a number of technical points, which in essence was a repetition of some of the grounds of appeal as adumbrated above.

4. Pursuant to the agreement between the parties which agreement was made an order of court by Hughes J on 2 September 2013, I conclude that there are no reasonable prospects of appeal succeeding on any of the points raised by the Applicant. I furthermore do not consider that another court could find that I had misdirected myself in the exercise of the residual discretion in terms of Rule 32.

5. The purpose of summary judgment is to enable a Plaintiff with a clear case to obtain swift enforcement of a claim against a Defendant who has no real defence to that claim. It is a procedure that is intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.

6. Based on the foregoing, the following order is made:

1. The application is dismissed with costs



VILAKAZI, AJ